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In the Supreme Court of the United States

OCTOBER TERM 1987

BADDOUR, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals erred in granting enforcement of a decision of the National Labor Relations Board (the "Board") because of the denial of due process to the Petitioner by the Administrative Law Judge at the underlying unfair labor practice hearing?

2. Whether the Sixth Circuit Court of Appeals applied the proper standard of review to the question of whether the Petitioner was accorded a fair and impartial hearing before the Board's Administrative Law Judge?

LIST OF PARTIES

Pursuant to Rules 21 and 28.1, the parties involved and having an interest in this Petition are as follows:

Petitioner: Baddour, Inc. is a publicly-owned corporation with its principal place of business in Memphis, Tennessee. There are no affiliates or subsidiaries of the Petitioner.

Respondent: National Labor Relations Board, a government agency.

Charging Party: Highway and Local Motor Freight Employees, Local 667, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, is a labor organization seeking to represent a unit of employees employed by the Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Baddour, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in National Labor Relations Board v. Baddour, Inc., Civ. No. 86-6224 (6th Cir. 1988), petition for rehearing en banc denied.

OPINIONS BELOW

The decision and order of the Board's Administrative Law Judge is reported at 281 NLRB No. 84 (1986) and is attached as Appendix "D." The decision of the Board is reported at 281 NLRB No. 84 (1986) and is attached as Appendix "C." The per curiam opinion of the Sixth Circuit is unreported and is attached as Appendix "B." The Denial of Petitioner's Petition for Rehearing En Banc is also unreported and is attached as Appendix "A."

JURISDICTION

Judgment of the Sixth Circuit was entered on May 18, 1988. Timely Petition for Rehearing En Banc was denied by the Sixth Circuit on August 15, 1988. The

jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are:

1. Sections 8(a)(1), 8(a)(3), 8(a)(4), and 10(e) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1), 158(a)(3), 158(a)(4), and 160 (e).

2. Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 29 C.F.R. §§102.35 and 102.64(a).

3. Judicial Code and Judiciary, 28 U.S.C. §144.

Pertinent portions of these statutory provisions are reproduced as Appendix "E."

I.

STATEMENT OF THE CASE

This matter arises from the attempt of Teamsters Local 667 to organize certain employees at the Petitioner's distribution warehouse in Memphis, Tennessee. An election was conducted among those employees on October 29, 1982, and the union failed to receive a majority of the ballots cast. The Teamsters filed a number of charges with the Board alleging that the Petitioner committed certain unfair labor practices. A hearing was held on the consolidated charges before the honorable Administrative Law Judge George C. Norman (the "ALJ") in Memphis. The hearing lasted eleven days spanning a three-month period. All parties were present at each of the hearing dates. This petition is

directed to the conduct of the ALJ at the hearing as it concerns the Petitioner's due process rights.

On October 11, 1983, the ALJ rendered his decision and order, finding in pertinent part that the Petitioner had violated Sections 8(a)(1), (3), and (4) of the National Labor Relations Act (the "Act"). The Petitioner timely filed exceptions to the ALJ's decision and order with the Board in Washington. In support of its exceptions, the Petitioner alleged that a number of the ALJ's findings and conclusions were not supported by record evidence and that during the conduct of the hearing, the ALJ was motivated by unlawful bias and prejudice toward the interest and position of the Petitioner.

On September 26, 1986, the Board issued its Decision in which it rejected most of the Petitioner's exceptions and adopted the ALJ's Decision almost in toto. See NLRB's Decision at Appendix "C."

Concerning the Petitioner's claim that it was denied due process at the hearing because of the ALJ's conduct of the hearing, the Board noted that certain of the ALJ's remarks were "unwise" but nonetheless concluded that there was no evidence of obvious bias toward the Petitioner. Accordingly, the Board left intact most of the ALJ's findings and conclusions.

In order to test its validity, the Petitioner refused to comply with the Board's Order, and the Board petitioned the Sixth Circuit for enforcement. On

review, the Sixth Circuit granted enforcement, finding no merit to the Petitioner's argument that it was deprived of a fair hearing by the ALJ. In enforcing the Order, the Sixth Circuit stated: "[w]hile we do not altogether approve of the manner in which the A.L.J. conducted the hearing, his indiscretions did not amount to a due process violation." Appendix B at B-6. In so ruling, the Sixth Circuit failed to express any legal standard by which it analyzed the ALJ's conduct at the hearing. While the appellate court did require the Board to respond to the Petitioner's Petition for Rehearing En Banc, it denied the Petition without comment by Order dated August 15, 1988.

II.

REASON FOR GRANTING THE WRIT

The record fully reveals that the ALJ committed multiple acts of prejudicial error that resulted in the denial of a fair hearing to the Petitioner. A summary of the ALJ's conduct follows.

The first example of prejudicial error committed by the ALJ was his incorrectly limiting the Petitioner's ability to cross-examine the General Counsel's witnesses on credibility while permitting the General Counsel to cross-examine on a much broader standard. The next significant example of prejudicial error by the ALJ was his usurping the role of the General Counsel and taking over the examination of the Petitioner's witnesses. Not only did the ALJ's

examination interrupt and disrupt the Petitioner's case, but his questions were not related to the substance of the Petitioner's questions or to the responses of the witnesses. While these actions not only reek of hostility, they also demonstrate inherent unfairness because the General Counsel and General Counsel's witnesses were not subject to the same type of questioning and treatment by the ALJ.

The next significant episode of prejudicial error by the ALJ was his unprovoked and unwarranted attacks upon the character of the Petitioner's witnesses. The following summarizes separately those unfounded accusations:

a. Paul Baddour (President) -- ALJ insinuated that if Mr. Baddour had not been an attorney, he would not have

had any qualms about terminating employees.

b. Greg Taylor (employee, witness for Petitioner) -- ALJ accused Mr. Taylor at the hearing of changing his testimony when clearly he had not done so.

c. Joe Talley (supervisor) -- ALJ attempted to elicit Mr. Talley to state that he was offended by Mr. Baddour's references to Christianity and morality.

d. Fred Stearns (Personnel manager) -- ALJ badgered witness and made overt, disparaging comparisons to how Mr. Stearns had handled certain situations and how a "competent" manager would have handled the same situation.

e. McDonald and Richardson (employees on employee non-union committee) -- ALJ sua sponte initiated line of questioning into formation of employee non-union committee despite the complete absence of any allegation in the complaint as to unlawful employer assistance in the formation of the same. When Counsel for the Respondent

> alerted the ALJ to that fact, the ALJ engaged in a discussion with General Counsel designed to suggest that General Counsel take over that line of questioning.

The final prejudicial error committed by the ALJ at the hearing is also perhaps the most serious. The ALJ ordered the expulsion of one of the Petitioner's counsel and threatened to expel the Petitioner's lead counsel. The ALJ's handling of that situation was completely unwarranted and an absolute abuse of his discretion. Obviously, this totally disrupted the presentation of the Petitioner's case. It is inconceivable that the ALJ's conduct was justified when considered in the context that (1) his exclusion of counsel came on the heels of the Petitioner's verbal motion for the ALJ to recuse himself - which he denied

out of hand -- and (2) that the ALJ had to take a fifteen minute recess to regain his composure. Indicative of the ALJ's demeanor is his statement on the record made shortly before the ejection of counsel:

> "I don't want anything for the record that I don't want in there. I'm running this hearing and not you."

Tr. 1700.

The foregoing are examples of the ALJ's conduct which the Board and the Sixth Circuit concluded did not evidence open bias against the Petitioner.[1] Had the Board and reviewing court applied the correct standard of review -- that the ALJ should have avoided even the

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1/ The Board did overrule the ALJ's findings and conclusions in several respects as being clearly contrary to the record evidence. See Appendix C.

appearance of bias or hostility -- it is submitted that the ALJ's decision and order would have been vacated and a new hearing directed to protect the Petitioner's due process rights.

III.

THE SIXTH CIRCUIT ERRED BY FAILING TO APPLY THE PROPER STANDARD OF REVIEW TO THE ALJ'S CONDUCT

It cannot be gainsaid that fundamental due process requires that parties to an administrative proceeding be afforded proper notice and a fair and impartial hearing. This elementary precept had it genesis in the 1935 Wagner Act by the Congressional guarantee that no order of the Board will be enforced unless supported by "substantial evidence

on the record considered as a whole."[2] 29 U.S.C. §160(e) (emphasis added).

This Court elaborated upon this guarantee of due process in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). There, the Court opined that "whole record" is not limited simply to evidence which supports the Board's decision:

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of

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2/ Originally, the Wagner Act only required that Board orders be supported by "evidence." The 1947 Amendments contained in the Taft-Hartley Act added the underscored language.

> review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. . . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

340 U.S. at 487 and 488 (emphasis added).

On the same day the seminal Universal Camera decision was issued, this Court decided NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951). That decision involved a ruling in which the Sixth Circuit had vitiated the Board's finding of a violation because of the examiner's bias. As found by the Sixth Circuit, the ALJ had drawn inferences

from testimony against the clear weight of the record as a whole. This Court affirmed the appellate court's ruling and observed that the Sixth Circuit had "painstakingly reviewed the record" and unanimously concluded that the Board's findings were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed "substantial." 340 U.S. at 502.

These principles mandate that a reviewing court must not merely defer to an administrative agency's findings of fact, but must also review the evidence, particularly that suggesting bias or partiality, closely and in its entirety. This appeal is taken to present to this Honorable Court the question of what standard should be applied by the courts

in reviewing Board decisions in which it is alleged that a Board ALJ acted in an arbitrary and biased manner toward a party, thereby impugning the concept of due process. Because there exists a divergence of authority among the circuits and because the facts of this case present an ideal vehicle for resolution by this Court of this important issue, the Petitioner requests that the Court issue a Writ of Certiorari to the Sixth Circuit to review the case sub judice.

1. The "Appearance of Hostility of Bias" Standard.

A fair trial by a fair and impartial trier of fact is the touchstone of fundamental due process. The requirement of impartiality must be vigorously protected to insure that the

integrity of this rudimentary precept of fairness is not vitiated.

In contemplating the application of the due process concept to adjudicating governmental agencies, this Court has observed that "[i]ts exact boundaries are undefinable, and its content varies according to specific factual contexts," but stated flatly that "it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." Hannah v. Larche, 363 U.S. 420, 442 (1960). Speaking broadly on the ambit of due process, this Court in In re Murchison, 349 U.S. 133, 136 (1955), announced:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always

> endeavored to prevent even the probability of unfairness. (Emphasis added.)

The Sixth Circuit, in reliance upon those principles, concluded in Utica Packing Co. v. Block, 781 F.2d 71, 78 (6th Cir. 1986), that the fairness required under procedural due process as it relates to quasi-judicial administrative hearings is the absence of actual bias and, indeed, "even the probability of unfairness."

The courts have long recognized in Board proceedings that even the appearance or suggestion of bias is patently offensive to the concept of due process. In Texas Instruments, Inc. v. NLRB, 599 F.2d 1067 (1st Cir. 1979), the First Circuit commented on the duty of courts to safeguard litigants' rights to a fair administrative trial against the

backdrop of adjudicatory unfairness. In setting aside the Board's order enforcing the ALJ's decision, in large part due to the conduct of the ALJ at the hearing, the First Circuit noted:

> We realize that tempers and patience run short in extensive, hard fought labor-management hearings. But this makes it all the more important for the presiding officer to set an example of evenhandedness. The sharp retort, the sly dig, the sarcastic innuendo cannot fail to give the appearance of injustice, no matter how sound and fair may be the final judgment.

599 F.2d at 1071 n.4 (emphasis added). The Fifth Circuit has also endorsed a similarly stringent standard. In Helena Laboratories Corp. v. NLRB, 557 F.2d 1183 (5th Cir. 1977), the Fifth Circuit addressed the urgent need for upholding

the minimal fundamental fairness in quasi-judicial agency proceedings:

> [A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.

557 F.2d at 1188; quoting from NLRB v. Phelps, 136 F.2d 562, 563-64 (5th Cir. 1943).

Indeed, this Court has previously underscored the obligation of agencies to refrain from the appearance of

impropriety. Justice Frankfurter cautioned the Board against failing to exercise appropriate judicial control in NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947). In that case, an employer appealed from a Board order remanding part of a case back to the same trial examiner that had previously denied it a fair hearing. While not finding the Board's order in that instance to be unwarranted, the Court warned as follows:

> The Board might have gone beyond the legal compulsions and ordered the new evidence to be heard before a new Examiner who could report with a mind wholly free from prior litigious embroilments. The Board might have been well advised also to allow greater leeway in admitting evidence not strictly relevant. It takes time to avoid even the appearance of grievances. But it is time well spent, even though it is not easy to satisfy interested parties, and

> defeated litigants, no matter how fairly treated, do not always have the feeling that they have received justice.

330 U.S. 219 at 237 (emphasis added).

The Board itself has consistently and fully embraced the "appearance of hostility" standard with respect to ALJ misconduct. In Engineers Beneficial Assn. District 1 (Crest Tankers), 274 NLRB 1481 (1985), the Board considered a motion by the General Counsel to recuse the ALJ on the grounds of bias and hostility. Granting the General Counsel's motion, the Board announced:

> . . . the Board notes that its proceedings should be free from any appearance of partiality or bias on the part of its administrative law judges. In granting the motions to recuse, the Board does not mean to imply that the administrative law judge is, in fact, prejudiced or biased. In all the

> circumstances, however, the Board is of the opinion that all parties would be better served if this matter were heard de novo before a different administrative law judge.

274 NLRB at 1482 n.5 (emphasis added). See also, Member Hunter's concurrence at 1485 ("[t]his kind of sarcastic repartee has no place in our proceedings and leaves an impression that the judge is not giving dispassionate consideration to arguments before him and is growing hostile to counsel."). This long-standing principle was stated earlier in Indianapolis Glove Co., 88 NLRB 986, 987 (1950), and was recently reaffirmed in Dayton Power & Light Co., 267 NLRB 202 (1983), and in Reading Anthracite Co., 273 NLRB 1502 (1985):

> [I]t is essential not only to avoid actual partiality and

> prejudgment . . . in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal. (Emphasis added.)

It thus becomes clear that due process is an imperative factor in determining whether "substantial evidence on the record considered as a whole" supports the administrative decision. Both the courts and the Board contemplate that the appearance of partiality is just as violative of that right as is actual partiality.

2. "Extra-Judicial" Source Standard.

Other courts have imposed a more onerous standard for reviewing ALJ impropriety. In Colfor, Inc. v. NLRB, 838 F.2d 164 (1988), the Sixth Circuit issued a decision which constituted an abrupt and unexplained departure from its earlier adherence to the "appearance of

hostility" standard in Utica Packing Co., supra. In Colfor, the Sixth Circuit summarily announced that bias must be shown to "stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case," quoting from United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

The Grinnell rationale should not be invoked by the courts in reviewing NLRB proceedings. First, Grinnell involved a motion to disqualify a federal district judge from hearing the merits of an antitrust action made pursuant to 28 U.S.C. §144 (see Appendix E), and it involved much less egregious facts than presented in the instant case. Secondly, the Grinnell standard is directly at odds with the solid line of this court,

appellate courts, and of the Board reflecting an attitude that it is the appearance of hostility that should be avoided in such matters rather than requiring proof of actual bias. Stated simply, the Grinnell standard represents an unwarranted and unnecessary departure from established court and agency precedent, does not comport with the concept of rudimentary fairness, and would essentially make any review of ALJ partiality illusory.[3]

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[3]/ The Fourth Circuit has also adopted the Grinnell standard in like cases. NLRB v. Top Form Mills, Inc., 789 F.2d 262 (4th Cir. 1986). The Seventh Circuit has endorsed a similarly stringent standard, defining bias as "complete disregard for sworn testimony coupled with a tongue-in-cheek characterization of those utterances." Medline Industries, Inc. v. NLRB, 593 F.2d 788, 795 (7th Cir. 1979). It does not appear that any movant has ever successfully established bias when faced with the Grinnell standard of review.

For those reasons, the Court should grant the Petitioner's application, issue a writ of certiorari to review the Sixth Circuit's enforcement of the Board's order, and determine that the proper standard to apply in this case and in other similar Board cases is the "appearance of hostility" standard.

IV.

THE REQUIREMENTS OF DUE PROCESS WERE NOT MET IN THIS CASE

An examination of the record of the unfair labor practice hearing reveals that the Petitioner was denied a fair, impartial hearing before the ALJ. The specific violations will be addressed below.

The ALJ's barbed attacks against the Petitioner's president on the grounds of his professional integrity and,

subsequently, against witness Talley concerning his religion are patently offensive to the concept of due process. In NLRB v. Aluminum Cruiser, Inc., 620 F.2d 116 (6th Cir. 1980), the Sixth Circuit found that an employer did not receive a fair hearing where the ALJ made inexcusable, injudicious attacks on its president including one directed at his ethnic background. Here, as in Aluminum Cruiser, this Court should find the ALJ's comments "could not but taint the entire proceeding." 620 F.2d at 118. Likewise, the ALJ's exploring new theories of violations even to the surprise of the General Counsel is entirely at odds with fundamental due process. See NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 548 (6th Cir. 1984) ("Due Process requires that a party charged with unlawful

conduct be given a `meaningful opportunity to meet the complaint.'" citing NLRB v. Complas Industries, Inc., 714 F.2d 729, 733 (7th Cir. 1983)).

Likewise, by limiting the Petitioner's right to cross-examine witnesses for credibility while allowing the General Counsel to cross-examine without any such limitation, the ALJ committed clear prejudicial error. In NLRB v. Overseas Motors, Inc., 818 F.2d 517 (6th Cir. 1987), when an ALJ committed a similar error, the Sixth Circuit remanded the case back to the Board to permit the employer to inquire into relevant areas. In addition, the ALJ permitted the General Counsel to offer hearsay while declining to allow the Petitioner to offer similar hearsay testimony. Another gross procedural

disparity was the ALJ's refusal to allow the Petitioner to engage in surrebuttal while at the same time allowing the General Counsel to engage in redirect. See Hagopian & Sons, Inc. v. NLRB, 395 F.2d 947 (6th Cir. 1968) (employer was prejudiced by examiner's refusal to permit employer to establish defense, by examiner's assuming role of General Counsel, and by his preconceived notions as to theory of complaint).

The record also is replete with evidence that the ALJ made numerous inappropriate comments at the close of the Petitioner's examination of its witnesses. Cp. Lawson Co. v. NLRB, 753 F.2d 471 (6th Cir. 1985) (one isolated comment after witness testified does not demonstrate ALJ's predisposition). The ALJ's incredible unprofessionalism raises

such a specter of uncertainty concerning his ability to render an unbiased ruling that this Court should resolve any question in favor of the Petitioner.

Finally, the ALJ's expulsion of the Petitioner's counsel and repeated threats to its lead counsel were absolutely unwarranted and a complete abuse of discretion. See Engineers Beneficial Assn. District 1 (Crest Tankers), supra (exclusion of counsel from unfair labor practice hearing was abuse of discretion).

CONCLUSION

There are two standards of review which have been followed by the various circuit courts when determining whether a decision of the Board should be enforced when there are allegations that the Board ALJ was biased toward a party -- the

"appearance of hostility" standard and the more stringent Grinnell standard. In the instant case, the Sixth Circuit did not indicate which standard it was following. The court merely stated that the Petitioner's assertion of bias was "without merit" and that there was "no evidence that [the Petitioner] was deprived of a fair hearing . . . ." Sixth Circuit's Decision at Appendix B, pp. B-6, B-7.

It is submitted that the appearance of hostility standard is the proper standard of review and that had the Board and the Sixth Circuit followed such a standard, the ALJ's findings and rulings would have been disallowed, and a new hearing would have been ordered before an impartial trier of fact. It is further submitted that the instant case is the

proper vehicle for this Court to resolve the conflict among the circuits, and to establish the proper standard for future Board proceedings and the proceedings of other administrative tribunals.

WHEREFORE, the Petitioner respectfully requests that this Court grant its Petition for Writ of Certiorari and grant it relief from an improper decision.

Respectfully submitted, this 7th day of September, 1988.

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CERTIFICATE OF SERVICE

I certify that on this 7th day of September, 1988, I served three copies of the Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit upon each of the following by United States mail, postage prepaid:

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